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In The
SUPREME COURT of the UNITED STATES
OCTOBER TERM 1959

No. [redacted] 93

TAL JOE PEARSON and
SQUIRE WILES,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

R. KYLE HAYES
T. R. BRYAN
Counsel for Petitioners

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

The petitioners, Tal Joe Pearson and Squire Wiles, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the two cases of Tal Joe Pearson and the one case of Squire Wiles, and which cases were combined in one opinion.

Opinion Below

The opinion of the Court of Appeals (Petitioners' Appendix A) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 6, 1959, and an order was entered by this Court on April 25, 1959, extending the time for filing petition for writ of certiorari to and including June 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

Questions Presented

1. May the sentencing Judge, after a conviction by the jury, use a pre-sentence investigation without any officer going on the stand as to the defendant's record and reputation and without disclosing to the defendant or his counsel, except by inadvertance, that he is using same, when the defendant in his trial before a jury had offered numerous witnesses of his good character and reputation and there was no evidence before the Court of a record or reputation, sentencing the defendant to 7-1/2 years imprisonment and to pay a fine totaling $10,100.00, 6 years of the sentence suspended on condition the defendant pay the fine?

2. Is the opinion in the instant case from the Fourth Circuit in conflict with the case of *Smith* v. *United States*, 223 F. 2d 750, from the Fifth Circuit?

3. Is the opinion in the instant case from the Fourth Circuit in conflict with the case of *United States* v. *Falcone*,

109 F. 2d 579, from the Second Circuit, and approved by the Supreme Court in 311 U.S. 205?

4. Is Title 26 U.S.C.A. 5213 and Title 26 U.S.C.A. 5609, 5686, intended by Congress to be the method of punishing offenders convicted of failure to file correct returns of sales of sugar and other substances, and the possession thereof, all of which are misdemeanors, or did Congress intend that the United States could elect to charge a defendant in connection therewith under Title 18 U.S.C.A. 1001 or Title 26 U.S.C.A. 7206, both of which are felonies?

5. Where the indictment alleges the possession of materials designed and intended for use in making distilled spirits is it a fatal failure of proof to fail to show that the ingredient is a necessary element in the manufacture of distilled spirits, or is the opinion of the Appellate Court that it is common knowledge within the area sufficient to dispense with that element of proof?

6. Is it prejudicial to convict the defendant on four counts of an indictment and sentence him to serve a term of four years and to pay a fine of $2,000.00 when the indictment fails to set out that statute under which he is convicted as is required by Rule 7 (c) of the Federal Rules of Criminal Procedure, when he is charged in the same bill of indictment with a conspiracy to violate three other sections of the code and convicted of a conspiracy on one of the counts and given a sentence of 18 months imprisonment and a fine of $7,000.00?

7. Can the United States charge in one count that on divers dates from January 1, 1957 through May, 1957 the defendant with at least one other common defendant

and others did unlawfully possess large quantities of sugar, and in four other counts on specific dates during said period covered, with the other common defendant and different persons in each count, other than the two common defendants, multiply the offense by the number of different defendants and different dates during that period of time; or does this constitute double jeopardy and a single offense?

8. Is the acquittal on the count charging the defendant along with a common defendant and other specific persons on divers dates from January 1, 1957 through May, 1957, with unlawfully having possessed large quantities of sugar intended for use in violation of the Internal Revenue Laws, inconsistent with a conviction on four other counts which charge the defendant and a common defendant in all four counts on specific dates and with specific other persons during that period with having possessed large quantities of sugar intended for use in the manufacture of nontaxpaid distilled spirits?

9. Does it constitute double jeopardy to charge the defendant on divers dates during a specified time to violate a statute and then charge the same defendant with the same offense alleging specific dates during the same period of time?

10. Does it constitute double jeopardy to charge the defendant and at least one other common defendant in each of four counts in an indictment on specific dates and with specific other persons, including the common defendant, with possessing specific amounts of sugar intended for use in the manufacture of distilled spirits, when there is another count charging, on divers dates during a given period in which the specific dates are included, the

defendant with one other common defendant and persons other than named in the count alleging divers dates, with having possessed large quantities of sugar designed and intended for use in the manufacture of distilled spirits?

Statutes Involved

The statutory provisions involved are Title 18 USC 371 which is the conspiracy statute: Title 26 USC 5213, which is return of materials used in the manufacture of distilled spirits when required by the secretary or his delegate to render a correct return, which includes sugar, etc. The penalty therefor is prescribed in Section 5600 which provides for a fine of not more than $500 or imprisonment of not more than one year or both. (Misdemeanor) Title 18 USCA 1001, that is, "- - - knowingly and wilfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." Title 26 USCA 7206 which provides: "Any person who—(1) Wilfully makes and subscribed any return - - - which contains or is verified by a written declaration that it is made under the penalties of perjury - - -; or (2) Aid or assistance - - -; or, (3) - - - falsely or fraudulently executes or signs any bond - - -, or other document - - -; or (4) - - - Removes, deposits, or conceals, - - -; (5) Compromises and closing agreement, - - - shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than 3 years, or both - - -. Title 26 U. S. C. 5686 (b)—"It shall be unlawful to have or possess

any liquor or property intended for use in violating the provisions of this chapter, or regulations prescribed thereunder, or which has been so used, and every person so having or possessing or using such liquor or property, shall be liable to a fine not to exceed $5,000, or to imprisonment for not more than 1 year, or both".

Rule 7 (c) of Federal Rules of Criminal Procedure, which provides that the indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Rule 32 (c) Presentence Investigation. (1) When Made. (2) Report.

Statement

In 1956 one Coley Roby Johnson was employed as a truck driver by Tal Joe Pearson, the owner and operator of a modern and up to date super market on the outskirts of the town of North Wilkesboro, North Carolina. Mr. Pearson also operated a wholesale establishment in connection with the super market. Johnson went to Mr. John West, Investigator for the Alcohol and Tobacco Unit in Wilkesboro, N. C. and asked him if he would be interested in him reporting information relative to the violation of the Internal Revenue Laws with reference to liquor and West agreed. Subsequent to that time and in January, 1957 the investigation developed into a raw materials investigation and was closed in July, 1957, by the arrest of these petitioners and others in the case.

There were 13 indictments against the petitioner Pearson containing a total of 46 counts growing out of this in-

vestigation covering a period from September, 1956 through July 2, 1957. These petitioners were called to trial before Roby Thompson, United States District Judge for the Eastern District of Virginia, sitting by designation in the Middle District of North Carolina.

Each of the counts in the indictment contained a different person; other than the two common defendants, one the petitioner Pearson and the other one who did not appeal, and specified specific dates during the months covered by the other counts in the indictment.

In the first case tried in the District Court (No. 435-W-57) Tal Joe Pearson along with Clyde McKinney Curry and other defendants were charged with a conspiracy to violate Title 26 USC 5213, which is return of materials used in the manufacture of distilled spirits when required by the secretary or his delegate to render a correct return, which includes sugar, etc. The penalty therefor is prescribed in Section 5609 which provides for a fine of not more than $500 or imprisonment of not more than one year or both. (Misdemeanor) And Title 18 USC 1001, that is "- - knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. Also to violate Title 26 USC 7206, which provides: "Any person who (1) wilfully makes and subscribes any return - - which contains or is verified by a written declaration that is made under the penalties of perjury - - - shall be guilty of a felony and upon conviction thereof shall be fined not more than $5,000 or imprisoned not more than

3 years, or both - -; and with five counts in the bill of indictment which charged that the petitioner, Tal Joe Pearson, and Clyde McKinney Curry on divers dates from January through May, 1957, with certain specified defendants, unlawfully had and possessed large quantities of sugar intended for us in violating the provisions of the Internal Revenue Laws relating to distilled spirits. Some of the counts specified the defendant, Tal Joe Pearson, and Clyde McKinney Curry on specific dates with having had and possessed large quantities of sugar intended for use in violating the Internal Revenue Laws with particular persons. Each of the last five counts in the indictment was for violation of Title 26 USC 5686, but that statute was not set out in the indictment.

At the close of the government's evidence the United States Attorney made a motion to dismiss the conspiracy charging the violation of Title 26 USC 5213, the misdemeanor count, and the Court allowed the same, and proceeded to the jury against the defendants for a conspiracy to violate Title 18 USC 1001, and Title 18 USC 7206, both felonies, and the five counts under Title 26 USC 5686, which statute was not listed on the indictment as required by Rule 7 (c) of the Federal Rules of Criminal Procedure.

After completion of the evidence which included evidence of good character of the petitioning defendants, and after deliberating on the first case from Wednesday night about 9 o'clock P.M. to 4:30 P.M. on the following Friday, the defendant Pearson was convicted on the felony charge of the conspiracy, being the only conspiracy submitted to the jury, and on four counts set out as overt acts, being violations of Title 26 USC 5686, and acquitted him on

the Seventh Count which charged that Pearson and Curry on divers dates from January 1957 through May, 1957, possessed large quantities of sugar intended for use in the manufacture of liquor.

On the remaining five counts, which were for violation of Title 26 USC 5686, but which statute was not set out in the indictment, the jury found the petitioner, Tal Joe Pearson and one common defendant guilty on four of the counts and not guilty on the last count which charged on divers dates from January 1, 1957; through May, 1957 the petitioner, Tal Joe Pearson, and Clyde Curry and others named had and possessed large quantities of sugar intended for use in violating the provisions of the Internal Revenue laws relating to distilled spirits, which period of time set out in the seventh count included the specific dates set out in the indictment with the exception of the fifth count which alleged in December, 1956, and all the counts named the petitioner, Tal Joe Pearson, and Clyde McKinney Curry, but varied the names of the other persons and charged large quantities of sugar on the specific dates set out therein.

When the jury took Case No. 435 the other case against this petitioner, Tal Joe Pearson, and also against the petitioner, Squire Wiles, and others, was called and a jury was selected to try that case (Case No. 450-W-57, and nos. 7707 and 7708 in the Circuit Court). The dates alleged in this indictment were specific dates and specific amounts during the period covered by the Not Guilty verdict in Count No. 7 of Case No. 435-W-57, which period charged from January through May, 1957; Pearson and others possessed large quantities of sugar designed and intended for use in the manufacture of liquor. There was no evi-

dence before the jury, the petitioners contend, that sugar was a necessary ingredient for the manufacture of liquor.

The jury convicted the defendants on two counts of this indictment which alleged specific dates in April and May, 1957, with specific amounts of sugar designed and intended for use in manufacturing liquor.

The jury on the second case returned within a few minutes of the jury in Case No. 435. After recording the verdicts the court adjourned and Saturday morning following when Court opened the Court proceeded to sentence the defendants without putting a single witness on the stand as to the defendants' character, record or reputation, sentencing Tal Joe Pearson, a businessman and owner and operator of a modern super market, to 7-1/2 years in prison and to pay a fine of $10,100. Six years of the prison sentence was suspended, provided the defendant paid the fine, otherwise the prison sentences were to run consecutively, making the total active imprisonment sentence 7-1/2 years.

Counsel for defendants had always been accustomed to the court hearing any witness against the defendant and his record, reputation and character, in open court and was not aware that the Court was using information received by him out of the presence of the defendant until the Court by its remarks indicated the same by saying in response to counsel that "That is about in keeping with the information I have", (Rep. Transcript page 564) and was not aware that the Court had used the information to the prejudice of the petitioners until the sentences were imposed.

The petitioners made motions for a new trial, which

motions are of record, and alleged in the motions that the defendants were deprived of their rights to confront their accusers in open court and that the Court used evidence other than that which came out in open court against them, which motions were overruled and the petitioners appealed to the United States Court of Appeals for the Fourth Circuit, and that Court sustained the lower Court.

Reasons for Granting Writ

The use of a presentence investigation has come to play an important part in modern criminology, but the presentence report is still subject to the due process clause of the Fifth Amendment and whenever it is at all practicable to observe the safe guards of the Fifth Amendment the same should be done and whether or not the defendant is entitled to know that the presentence investigation is being used against or for him, and whether or not the same can be made available to the Court without the knowledge of the defendant, or without his attorney having the privilege of examining it, or knowing the truth or falsity of what it contains; is a matter of great importance to every citizen convicted of crime and in the interest of the fair administration of justice this Court should grant a writ of certiorari in this case to determine whether or not, and under what conditions, the contents of the presentence report or the substance thereof should be revealed in open court by a witness or by the court prior to the sentencing of the defendant, so that he may have an opportunity to deny any portion of the accusations that are untrue and to correct them, or whether the court can take the report as true and impose a sentence without revealing by a witness or otherwise the contents of said report, or any portion thereof.

No doubt the interest of convicted persons about to be sentenced can be more carefully safeguarded by open hearings under such rules as the court may adopt. The due process clause of the Fifth Amendment protects those convicted in Federal Court no less than the 14th Amendment protects those convicted in state courts. *Smith* vs. *U.S.* 223 Fed 2nd 750.

The Trial Court in this case stated at page 565 of the Court Reporter's Transcript: "I wish I could go along with you in your request not to give him a sentence but I find myself unable to do it and I have given a great deal of consideration to the reports in this case and to the evidence. Very frankly I changed my mind this morning from what I had in mind at 12 o'clock last night after I had stopped reading, and of course it becomes the duty of the Judge to make up his mind as to what's right and just between the government and the defendant and I will have to announce what the Court thinks would be right and proper.".

The case at bar presents squarely the question whether or not a presentence investigation or probation report may be made available to a Trial Judge before sentence without the knowledge of the defendant or his counsel of what it contains and without the right to refute any portion thereof if found erroneous, and whether the presentation in such a manner is a denial of the due process clause of the constitution.

Petitioners contend that in addition to the presenting of a question of public importance in connection with the use of a presentence investigation report that the opinion of the Fourth Circuit in this case conflicts with the opinion

of the Court in the Fifth Circuit in the case of *Smith* v. *United States*, 223 F. 2d 750, and that the manner of the use of the reports prejudiced these petitioners, and deprived them of the due process of law as guaranteed to them by the Fifth Amendment. That as is shown by the sentence imposed herein to wit, 7-1/2 years and a $10,100 fine as to Pearson, and an 18 months sentence and a fine of $2,000 as to Wiles, the petitioners contend that there were in the reports which the Court referred to and the matters which he was reading at 12 o'clock midnight the night before the imposition of the sentence, matters not disclosed from the witness stand, for under the evidence as disclosed from the witness stand the petitioner, Tal Joe Pearson, was the owner and operator of a modern super market and a man of good character and no evidence was offered of any prior criminal record, yet Pearson was sentenced to imprisonment for 7-1/2 years with 6 years suspended on condition he pay the fine of $10,100, and Wiles was sentenced to 18 months imprisonment and to pay a fine of $2,000.

What is said above with reference to the use of the probation report and the presentence investigation is equally applicable to cases numbers 7707 and 7708 (in the Circuit Court) in that the Court without hearing any evidence imposed on the defendant, Squire Wiles, a sentence of 18 months and $2,000 fine.

The method previously used in the District Court for the Middle North Carolina District prior to the time of the trial of the instant cases was, after conviction and before sentence, to place any witnesses on the stand as to record, character and reputation and reports, to confront the defendant with the FBI records and such other matters as might be to his hurt and give him an opportunity to

hear the witnesses in open court before the imposition of sentence. The Trial Judge was from outside the district and to proceed in the manner as was following in this case was unusual procedure to the defendants and their counsel.

The petitioner, Tal Joe Pearson, contends on the question of the counts in the first case that this opinion conflicts with the opinion of this Court in *United States* vs. *Carroll*, 345 U.S. 457, in that they multiplied the counts by the specific dates when they had included them by alleging divers dates from January, 1957 to June, 1957 in one count, and the defendant, Tal Joe Pearson, and one other in the same count, and then to add to it other individuals on specific dates, thus trying to multiply the offense of possessing large quantities of sugar during that period of time on specific dates by naming in some instances the large quantities of sugar and then on other Counts alleging specific amounts, which is not only multiplying one offense, but it violates the petitioner's rights as guaranteed to him under the Constitution as to double jeopardy. This question was treated with by this Court recently in the case of *Gore* vs *U.S.* 357 U.S. 386 both in the opinion and in the dissenting opinion.

The Court holds in the Carroll case cited above that "To multiply the crimes by the number of forms required to be filed is to revise the regulatory scheme. So far as the information returns are concerned the purpose of 145 (a) seems to us to be fulfilled when the section is applied only to the failure to file form 1096."

The petitioner, Tal Joe Pearson, was acquitted on the Seventh Count of the indictment which charged from Jan-

uary 1st through May, 1957, on divers dates the defendant possessed large quantities of sugar intended for use in the manufacture of distilled spirits with one Clyde McKinney Curry and the other counts, except the Fifth Count, on which he was convicted was on specific dates during the same period covered by the Seventh Count and an acquittal of the defendant, Tal Joe Pearson, and Clyde McKinney Curry, on the Seventh Count seems to the petitioner to be an inconsistent verdict with the findings of guilt on the Third, Fourth and Sixth Counts in the indictment as to the petitioner, Tal Joe Pearson, and Clyde McKinney Curry, on the specific dates and on the two counts on which the petitioner Pearson was convicted in the subsequent case were dates within the period on which he had previously been tried on the same offense, that is possessing materials designed and intended for use in the manufacture of distilled spirits in which the jury did return a verdict of Not Guilty.

Rule 7 of the Federal Rules of Criminal Procedure provide that the indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. There is a provision that error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

However, the petitioner, Tal Joe Pearson, points out that there could be no more flagrant show of the petitioner having been prejudiced than appears in this case. On the four counts which he was convicted on petitioner, Tal Joe Pearson, was senteneed to four years and to pay a fine of

$2,000. The prison sentence being suspended on these counts on condition that the fine be paid.

The Federal Rules of Criminal Procedure ought to be applied with strict regularity in favor of the defendant as well as in favor of the government. The United States in this case had set out in the body of the indictment against the defendant 18 USC 371, 1001; 26 USC 5213, 7206, when in fact he was tried for the violation of those statutes plus an additional statute not numbered which was Title 26 USCA 5686.

The petitioners further contend that Congress in enacting 18 USC 371 intended that the punishment for a conspiracy to commit a misdemeanor should not exceed the punishment for the misdemeanor itself; that Congress intended that Title 26 USC 5213 would be the punishment for failing to file correct returns of materials possessed and designed and intended for use in the manufacture of distilled spirits; that a conspiracy to violate Title 26 USCA 7206 would be a felony and applies to a conspiracy to wilfully make and subscribe any return which contains or is verified by a written declaration that is made under penalties of perjury. That Title 18 USC 1001 relates to the making or using of false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, and that Congress intended to provide that the punishment for actions connection with the possession of materials designed for the manufacture of distilled spirits should be a misdemeanor and that this Court should determine whether or not it was the intention of Congress to so do in enacting Title 26 USC 5613, 5609.

The petitioner further contends that the opinion of the Fourth Circuit conflicts with the holdings in the case of

United States v. *Carroll*, above cited, in which case Justice Douglas delivered the opinion, and he said:

> "We hesitate to conclude that a failure to file an unverified schedule is given the same dignity as the failure to file the verified return. We are dealing with criminal sanctions in the complicated, technical field of the revenue law. The code and the regulations must be construed in light of the purpose to locate and check upon recipients of income and the amounts they receive. See S. Rep. No. 103, 65th Cong., 1st Sess. 20. But at the same time every citizen is entitled to fair warning of the traps which the criminal law lays. Where the "return" prescribed is a verified Form 1096 together with all the unverified Forms 1099 it does not seem fair warning to charge a person for more than the failure to make that return. *To multiply the crimes by the number of Forms 1099 required to be filed is to revise the regulatory scheme.* So far as these information returns are concerned, the purpose of § 145(a) seems to us to be fulfilled when the sanction is applied only to a failure to file Form 1096."

The petitioner, Tal Joe Pearson, contends to give him 7-1/2 years prison sentence with a $10,100 fine, he being, according to the evidence a man of good character and the owner and operator of a legitimate and modern super market, is cruel and unusual punishment and does not give the citizen a fair warning of the traps the criminal law lays and that he is entitled to have the Court review his case.

That to the same effect the case of *United States* v.

Falcone 109 F. 2nd 579, which is a case from the Second Circuit, and reviewed by the Supreme Court in 311 U.S. 205 is a contrary holding from the holding in the instant case, and to that extent this case conflicts with the holdings in the Second Circuit.

It will be noted that the case against Tal Joe Pearson (No. 7706 in the Circuit Court of Appeals) was tried by one jury, and that the other case against Tal Joe Pearson and Squire Wiles was tried by another jury during the same term of court, but that the opinion treats the cases in the one opinion. We quote the following from page 8 of the opinion:

> "The appellant, Wiles, complains that in his case the government offered no affirmative evidence that sugar was a necessary ingredient in making whiskey, a circumstance which he contends is a fatal failure of proof. The fact is one of such common knowledge in Wilkes County that it well might be noticed without proof, but in this case there was abundant proof that the sugar was sold by Pearson and purchased by Wiles for the purpose of making illicit whiskey. Whether Wiles might have made the whiskey without the sugar is quite irrelevant when it clearly appears that he acquired the sugar for the purpose of the whiskey distillation."

The petitioners contend that common knowledge of jurors will not suffice to take the place of proof that an article is a necessary ingredient in the manufacture of distilled spirits where it is charged that the possession thereof is unlawful, and the article complained of is a legitimate article of commerce.

The opinion of the Circuit Court in this case states that: "Modern criminology, however, would receive a tremendous blow were it held that the sentencing judge could not inform himself of the content of a probation report prior to imposing sentence, for much of the progress which has been gained in the imposition of sentences is the direct result of the presentence use of such reports." The petitioners concede that the use of a presentence report is important in the administration of justice. It is the manner and method of the use in this case that the petitioners complain. If the sentencing court may take the probation reports and examine them in his room at the midnight hour out of the presence of the defendant or his counsel and without the knowledge that the Court has done the same until he starts to impose the sentence, and then disregard the evidence of good character offered in the trial and impose a prison sentence of 7-1/2 years on a business man who has never before been imprisoned, surely the petitioner Pearson has been deprived of the due process clause of the Constitution and this Court ought to grant the petitioner a writ of certiorari to spell out the manner in which these reports may be used.

The District Courts have gradually interpreted the Rules of Criminal Procedure arising under the Fourth and Fifth Amendment in favor of the government and been supported by the Circuit Court of Appeals in such interpretations until the rules of Criminal Procedure and the constitutional guaranties have had and do have a hollow sound meaning almost nothing and unless checked by this Court will mean that an indictment brought against a defendant will be the equivalent of a conviction, with the bill of rights in our Constitution set at nought.

CONCLUSION

The petition for writ of certiorari should be granted because this case presents a question of general importance in that it would prescribe the method in which the presentence investigation might be used in connection with the sentencing of a defendant. It presents a question of general importance as to whether or not it was the intent of Congress that Title 26 USCA 5613 and 5609 should be the punishment for persons convicted in connection with the violation of the offense prescribed therein of possessing sugar or a conspiracy to possess and deal in sugar and other materials designed and intended for use in the manufacture of liquor, or for failure to file the required reports or whether Congress intended that Title 18 USC 1001 should apply to unverified forms submitted to an administrative agency, such as the Alcohol and Tobacco Tax Unit in the field; and it presents a question of whether the United States Attorney's office or some agency can break an offense down into as many different counts as they can find variations of dates or persons to charge an additional count and thus pile up the punishment on a defendant. It presents a question of general importance as to whether a conviction on divers dates during a specified period is a bar to the prosecution on specific dates and thus constitutes double jeopardy.

That said petition presents questions of general importance and, the Court should grant the petition for certiorari.

Respectfully submitted,

R. KYLE HAYES
T. R. BRYAN
Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7705.

Isaac Henry Call,
Appellant,

versus

United States of America,
Appellee.

No. 7706.

Tal Joe Pearson,
Appellant,

versus

United States of America,
Appellee.

No. 7707.

Tal Joe Pearson,
Appellant,

versus

United States of America,
Appellee.

No. 7708.

Squire Wiles,
Appellant,

versus

United States of America,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT WILKESBORO. ROBY C. THOMPSON, DISTRICT JUDGE.

(Argued January 5, 1959. Decided April 6, 1959.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and BOREMAN, District Judge.

W. H. McElwee and Max F. Ferree (McElwee & Ferree on brief,) for Appellant, and H. Vernon Hart, Assistant United States Attorney, (James E. Holshouser, United States Attorney, on brief) for Appellee in case No. 7705. Kyle Hayes for Appellant in cases Nos. 7706 and 7707, T. R. Bryan for Appellant in case No. 7708, and John E. Hall and Lafayette Williams, Assistant United States Attorneys, (James E. Holshouser, United States Attorney, and H. Vernon Hart, Assistant United States Attorney, on brief) for Appellee in cases Nos. 7706, 7707 and 7708.

HAYNSWORTH, Circuit Judge.

The sale of large quantities of sugar from a supermarket in North Wilkesboro, North Carolina, led to an investigation and two separate indictments of a number of persons, some being charged with conspiracy and some with possession of contraband. Some of the convicted defendants have appealed from the judgments of conviction.

There was abundant testimony to support a finding that in September 1956 Tal Joe Pearson, the operator of the supermarket, sought the assistance of one, Coley Roby Johnson, in promoting the sale of sugar to illegal distillers. Johnson had but recently been released from prison, where he had been confined after conviction of a violation of the revenue laws, and, apparently, was well-known in the illicit whiskey trade in Wilkes County. The suggestion was that Johnson promote the sales and permit Pearson to report them as sales made to Johnson rather than to the actual purchasers. For the service, including the use of his

name as the ostensible purchaser, Johnson was to receive a salary from Pearson, the compensation being later changed to a commission upon all such sugar sales. Before concluding the arrangement, Johnson consulted agents of the Alcohol and Tobacco Tax Unit in Wilkesboro. The agents suggested that Johnson accept the proposal and keep them informed. Johnson agreed to do so, and thereafter reported all developments to the agents.

In November 1956 Pearson was served with a "demand letter" requiring that he report on Treasury Form 169 all sales of sugar from his supermarket of more than sixty pounds each, as well as certain other products used in distilling illegal whiskey. Evidence of an earlier "demand letter" upon the predecessor of Pearson's supermarket business was excluded by the District Judge, but, if the testimony of Johnson is to be believed, Pearson thought in September 1956 that he was required to file such reports, for the arrangement with Johnson was that all such sales would be falsely reported by Pearson as having been made to Johnson.

There was evidence of a number of sales of very large quantities of sugar from the supermarket after November 1956, some of which were made by Johnson, some by Pearson, but Johnson received a commission upon them all, and those involved in these proceedings were falsely reported on Treasury Form 169 as having been made to Johnson.

An indictment was returned charging Pearson and eleven purchasers of sugar from Pearson's supermarket, including Isaac Henry Call, with conspiracy to possess sugar for the unlawful purpose of distilling illegal whiskey.

A second count charged the same persons with conspiracy to violate Title 18 USCA § 1001 by concealing the identity of the purchasers of sugar through the filing of false reports on Treasury Form 169. Five additional counts charged Pearson and certain of the purchasers of sugar with its unlawful possession for the purpose of distilling illegal whiskey.

Another indictment in three counts charged Pearson, one Squire Wiles and two others, with unlawful possession of sugar for the illegal purpose of distilling spirits.

Before the jury brought in its verdict a number of the defendants changed their pleas from not guilty to guilty, and the jury found Wiles guilty under two counts of the indictment naming him, while Pearson was found guilty under counts of both indictments, and Call was found guilty of conspiracy to violate Title 18 USCA § 1001, but was acquitted of the charge of illegal possession of sugar. The first count of the seven count indictment, charging a conspiracy to possess sugar for illegal purposes, had been dismissed by the prosecution.

Pearson appeals upon more than twenty-five separate grounds, in none of which do we find any merit. His principal reliance appears to have been upon five points which need be mentioned but briefly.

Pearson first complains that he cannot be convicted of a felony for filing false statements on Treasury Form 169, for he says they are unverified statements. His reliance is upon *United States* v. *Carroll*, 345 U. S. 457, 73 S. Ct. 757, 97 L. Ed. 1147, in which a very different question was before the Court. There the Court was concerned with the failure to file information returns on Forms 1099

accompanied by transmittal Form 1096. Only Form 1096 was required to be verified, while the separate Forms 1099, one for each payee, are unverified. The indictment there had charged, in multiple counts, that the defendants had failed to file separate Forms 1099, and the Supreme Court held that the gist of the offense under Section 145(a) of the Internal Revenue Code, 16 USCA 7203, was the failure to file Form 1096. We are not concerned here with an attempt to multiply the offense, or with duplicitous counts, and whatever the proper definition of a "return," as that term is used in the Internal Revenue Code, it has no bearing upon the proper construction of Section 1001 of Title 18. The offense here is not simply the making of a false statement. It is the concealment of material information, to which the federal agency is entitled, through the use of a false and fictitious document. There is no requirement in the section that the document, by which the concealment is accomplished, must be verified.

Pearson next complains that the counts which charged him with unlawful possession of sugar omitted any reference to the statute alleged to have been violated, as required by Rule 7(c) of the Federal Rules of Criminal Procedure. It is true that those counts do not contain any statutory reference, but it is perfectly clear from the content of each count that it charged a violation of Title 28 USCA § 5686. It cannot be reasonably construed to charge any lesser, or other, offense. The defendant was represented at the trial by able counsel, whose many objections show complete familiarity with the technical requirements, but he sought no additional information and made no objection, before or during the trial, about the omission of the statutory citation. Since the defendant could not have been misled, or prejudiced in any way, by the omission, a vaca-

tion of the sentence would be unwarranted. *Hollowell* v. *United States*, 6 Cir., 245 F. 2d 829.

The seventh count of the seven-count indictment charged Pearson, together with certain other named defendants, with unlawful possession of sugar "on divers dates from January 1, 1957 through May 1957," while the sixth count of that indictment and the first and second counts of the other indictment charged him, together with different defendants, with unlawful possession of sugar on specific dates during the period January 1-June 1, 1957. The jury acquitted Pearson on the seventh count, in the light of which he now contends that his conviction on count six of that indictment, and counts one and two of the other indictment, cannot be allowed to stand. There is, however, no actual, or apparent, inconsistency in the finding that Pearson, together with certain individuals, acting jointly, was not guilty of unlawful possession of sugar at any time during the entire period, while he, jointly with certain other persons not mentioned in the seventh count, was guilty of such unlawful possession on specific dates within that period. Moreover, the appellants' legal assumption is unwarranted, for if inconsistency is found in a verdict of guilty on one count and an acquittal on another, the verdict of guilty is not invalidated if there is evidence to support it. *Dunn* v. *United States*, 284 U. S. 390, 52 S. Ct. 189, 76 L. Ed. 356; *Williams* v. *United States*, 4 Cir., 151 F. 2d 736.

Relying upon *United States* v. *Falcone*, 2 Cir., 109 F. 2d 579, Pearson contends that his knowledge that the purchasers to whom he made sales of sugar intended to use the sugar in violation of the revenue laws is insufficient to support a conviction of Pearson, jointly with the purchasers, of unlawful possession of the sugar. The conten-

tion, however, hardly fits the facts of the present case, for the proof shows that Pearson was not merely a legitimate wholesaler declining to make sales when he knew, or had reason to believe, that the purchaser intended to make an unlawful use of the sugar. Pearson was actively promoting the sale of sugar to illegal distillers. His activity went far beyond a routine sale, and his knowledge of the intended use of the sugar was accompanied by affirmative acts, in aid of the distillers' illegal purpose. With respect to the specified transactions, Pearson's possession was not that of a law-abiding merchant who holds goods for sale in the ordinary course of business, for, after making the particular sales, he performed other acts to conceal the identity of the purchaser, to protect his possession, and, upon some occasions, to make clandestine delivery. Pearson did not intend himself to use these particular lots of sugar for the manufacture of illegal whiskey, but he possessed them with a purpose of actively and affirmatively assisting others to do so, and his possession is equally unlawful with that of his vendees who were the actual operators of the stills.

Finally, Pearson complains that the District Judge considered a report of the Probation Officer before the sentence was imposed. Apparently, the contention is that despite the provisions of Rule 32(c)(1) of the Federal Rules of Criminal Procedure, a trial judge may not inquire into the content of the probation report until after sentence has been passed without depriving a defendant of his constitutional rights. Of course, the content of a probation report should not be disclosed to a trial judge, or to the trier of fact, until the guilt of a defendant is established by his voluntary plea or the verdict of a jury. Modern criminology, however, would receive a tremendous blow were it held that the sentencing judge could not inform himself of

the content of a probation report prior to imposing sentence, for much of the progress which has been gained in the imposition of sentences is the direct result of the presentence use of such reports.

The appellant, Wiles, complains that in his case the government offered no affirmative evidence that sugar was a necessary ingredient in making whiskey, a circumstance which he contends is a fatal failure of proof. The fact is one of such common knowledge in Wilkes County that it well might be noticed without proof, but in this case there was abundant proof that the sugar was sold by Pearson and purchased by Wiles for the purpose of making illicit whiskey. Whether Wiles might have made the whiskey without the sugar is quite irrelevant when it clearly appears that he acquired the sugar for the purpose of the whiskey distillation.

Wiles also complains that he was given a final sentence of eighteen months when the maximum sentence on each of the two counts upon which he was convicted, was twelve months. As we have frequently pointed out, where the defendant was convicted upon more than one count, a general sentence is not unlawful, though it is for a longer term than any single count would support, so long as it does not exceed the maximum term which might be imposed upon all counts, if the separate sentences were to be served consecutively. *Hart* v. *United States*, 4 Cir., 258 F. 2d 559; *Marlette* v. *United States*, 4 Cir., 249 F. 2d 95; *Hamilton* v. *United States*, 4 Cir., 204 F. 2d 927; *Neely* v. *United States*, 4 Cir., 2 F. 2d 849.

The appeal of the defendant Isaac Henry Call is more meritorious.

Call was one of the defendants charged with conspiracy to violate Title 28 USCA § 1001. He was also charged with unlawful possession of contraband sugar, but the jury acquitted him under the possession counts while convicting him of the conspiracy charge.

There was evidence that Call and one, Curry, visited Pearson's supermarket on January 17, 1957, at which time Call paid for a large quantity of sugar and arranged to have Johnson deliver it to him in a remote area that night. Johnson promptly reported the sale to agents of the ATTU, who secreted themselves near the designated delivery point, observed what occurred there, and testified about their observations.

In accordance with the instructions of Call and Curry, Johnson loaded a truck, belonging to Curry, with sugar and drove the loaded truck that night to the designated point of delivery. There Call, Curry and one, Anderson, awaited him in Call's automobile. Johnson and Anderson exchanged places, and Anderson drove off to take the sugar to its destination. When Anderson returned with the empty truck, Johnson again took it over, drove to Pearson's supermarket, reloaded the truck with sugar and returned to the delivery point. Again, he delivered the loaded truck, and Anderson drove it away, while Call and Curry drove Johnson back to Wilkesboro.

A few days later, agents found a large still on the ridge upon which the delivery of the sugar was effected. Anderson was arrested at the still site and a truck, similar to the one used in the delivery of the sugar, was seized. Approximately a month earlier, agents had seized a large still close by Call's home and in such relation to his house and land

as to warrant the inference that, if Call was not the operator of the still, he was fully aware of its existence.

Call testified he was in Florida on January 17, 1957, the date of the purchase and delivery of this lot of sugar.

It is apparent from the testimony of the law enforcement agents and of Johnson that there was abundant evidence upon which a jury might have found Call guilty of illegal activity, but he was tried only as one of the conspirators to violate Title 18 USCA § 1001 and for unlawful possession of contraband sugar. The jury acquitted him of the possession charge, however, and his conviction as one of the conspirators must be tested in the light of the specialized purpose of the alleged conspiracy.

One of the essential elements of that charge was that Call knew that sugar purchases were to be, or had been, misrepresented by Pearson in his filings of Form 169. Johnson testified that he had told Curry of the *modus operandi*, and it appears that Call and Johnson were old acquaintances, each of whom knew of previous illegal activities of the other. Certainly, the jury might have concluded that Call knew that his purchase of sugar would not be accurately reported to law enforcement officials, but vendors of sugar are not required to report large sales unless they have been served with a "demand letter." Knowing of the activities of Pearson and Johnson and their willingness, for a premium price, to make surreptitious delivery of large quantities of sugar, Call may well have assumed that no report by Pearson was required and that none would be made. Indeed, it is frankly conceded that such an assumption would be more likely than a supposition that a report was required and that the sale would be falsely reported, particularly if the ostensible vendee was known to Call to be Johnson, who for months had been

present, open to investigation and available for arrest. Curry may have told Call of the actual situation, but there is no direct evidence that he, or anyone else, did tell him, and the conclusion that Call knew that the sale would be concealed through the filing of a false report rests only upon speculation.

However compelling our conviction that Call has been guilty of wrongdoing, we may not affirm his conviction as a co-conspirator unless the evidence is reasonably susceptible of the inference that he knew of the conspiracy. *Jones* v. *United States*, 10 Cir., 251 F. 2d 288; *Duke* v. *United States*, 5 Cir., 233 F. 2d 897; *Johns* v. *United States*, 5 Cir., 195 F. 2d 77; *Jeltl* v. *United States*, 9 Cir., 127 F. 2d 585. When it appears, as here, that more likely than not, he acted as he did, confident in his immunity from arrest, for a reason quite independent of knowledge of the alleged conspiracy, a jury may not disregard the more likely probability and found a verdict upon the speculative possibility that Call acted with knowledge, and in aid, of the conspiracy to conceal material facts by filing false reports. *Guevara* v. *United States*, 5 Cir., 242 F. 2d 745; *Kassin* v. *United States*, 5 Cir., 87 F. 2d 183; *Karchmer* v. *United States*, 7 Cir., 61 F. 2d 623. See also *Johns* v. *United States*, 5 Cir., 195 F. 2d 77.

That is not to say that a criminal case may be withdrawn from the jury when the court entertains doubt of the defendant's guilt of the specific charge. We look at the evidence in the light most favorable to the prosecution and are bound by the jury's finding when there is substantial evidence, so viewed, to warrant the conclusion by reasonable men that the defendant is guilty beyond a reasonable doubt. *Bell* v. *United States*, 4 Cir., 185 F. 2d 302.

When there is a total absence of direct proof of an essential fact, however, the evidentiary facts, viewed in the light most favorable to the prosecution, must fairly warrant its inference; if they do not and the inference is so tenuous as to amount to mere speculation, the verdict is conjectural and must be set aside.

The judgment of conviction in No. 7705 will be reversed; that in Nos. 7706, 7707 and 7708 will be affirmed.

No. 7705 reversed;

Nos. 7706, 7707 and 7708 affirmed.